

**SUPREME COURT OF CANADA**

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| **Citation:** Bernard *v.* Canada (Attorney General), 2014 SCC 13, [2014] 1 S.C.R. 227 | **Date:** 20140207  **Docket:** 34819 |

**Between:**

**Elizabeth Bernard**

Appellant

and

**Attorney General of Canada and**

**Professional Institute of the Public Service of Canada**

Respondents

- and -

**Attorney General of Ontario, Attorney General of British Columbia,**

**Attorney General of Alberta, Public Service Alliance of Canada,**

**Privacy Commissioner of Canada, Canadian Association of Counsel to Employers, Canadian Civil Liberties Association, Canadian Constitution Foundation,**

**Alberta Federation of Labour, Coalition of British Columbia Businesses, Merit Canada and Public Service Labour Relations Board**

Interveners

**Coram:** LeBel, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

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| **Reasons for Judgment:**  (paras. 1 to 42)  **Reasons Dissenting in Part:**  (paras. 43 to 114) | Abella and Cromwell JJ. (LeBel, Karakatsanis and Wagner JJ. concurring)  Rothstein J. (Moldaver J. concurring) |

Bernard *v.* Canada (Attorney General), 2014 SCC 13, [2014] 1 S.C.R. 227

Elizabeth Bernard Appellant

v.

Attorney General of Canada and

Professional Institute of the Public Service of Canada Respondents

and

Attorney General of Ontario,

Attorney General of British Columbia,

Attorney General of Alberta,

Public Service Alliance of Canada,

Privacy Commissioner of Canada,

Canadian Association of Counsel to Employers,

Canadian Civil Liberties Association,

Canadian Constitution Foundation,

Alberta Federation of Labour,

Coalition of British Columbia Businesses,

Merit Canada and

Public Service Labour Relations Board Interveners

**Indexed as: Bernard *v.* Canada (Attorney General)**

2014 SCC 13

File No.: 34819.

2013:  November 4; 2014:  February 7.

Present: LeBel, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

on appeal from the federal court of appeal

*Labour relations — Administrative law — Standard of review — Unions — Representational duties — Labour relations board ordering employer to disclose home contact information of members of bargaining unit to union — Board holding that disclosure necessary to permit union to carry out representational duties — Individual employee challenging order on grounds that it violated her rights under Privacy Act and s. 2(d) of Charter — Whether board’s decision determining that order did not contravene Privacy Act was reasonable — Public Service Labour Relations Act, S.C. 2003, c. 22, ss. 2, 186(1)(a) — Privacy Act, R.S.C. 1985, c. P‑21, s. 8(2)(a).*

B is a member of a bargaining unit in the federal public service, but does not belong to the union which has exclusive bargaining rights for her bargaining unit. In other words, she is a “Rand Formula employee” who, although not a union member, is entitled to the benefits of the collective agreement and representation by the union and is required to pay union dues. The union is the exclusive bargaining agent for all members of the bargaining unit and has representational duties — such as in collective bargaining, the grievance process, workforce adjustments, prosecuting complaints, and conducting strike votes — which are owed to all bargaining unit members, whether or not they are members of the union.

In 2005, as a result of amendments to the *Public Service Labour Relations Act* which significantly expanded the union’s representational obligations, the union sought home contact information for bargaining unit members from the employer. The employer refused. This led to complaints to the Public Service Labour Relations Board by the union alleging that the refusal to provide this information constituted an unfair labour practice. The union alleged that failure to provide it with home contact information for bargaining unit members improperly interfered with its ability to represent them. The Board decided that the employer’s failure to provide the union “with at least some of the employee contact information that it requested” was an unfair labour practice because it interfered with the representation of employees by the union.

But on remedy, the Board asked for more information about several privacy‑related issues: what information the union required for its representational obligations; what employee contact information the employer had in its possession and its accuracy; and whether the employer could meet its obligation to provide information in a way that reasonably addressed any concerns under the *Privacy Act*. The Board directed the parties to consult in order to determine whether they could agree on disclosure terms, failing which the Board would hold a further hearing to address the question of remedy. The parties did in fact reach an agreement about the remedy, which the Board incorporated into a consent order.

Under the terms of the agreement, the employer was required to disclose to the union, on a quarterly basis, the home mailing addresses and home telephone numbers of members of the bargaining unit, subject to a number of conditions, all of which related to the security and privacy of the information. The union undertook not to disclose the information to anyone other than the appropriate union officials; not to use, copy or compile the information for any other purpose; and to ensure that its officials who had access to the information would comply with all the provisions of the agreement. The employer and the union also agreed that they would jointly advise employees as to what information would be disclosed prior to its disclosure, and agreed on the text of that notice. An email was accordingly sent to all bargaining unit members, including B. She responded by seeking judicial review of the consent order.

The Federal Court of Appeal concluded that the Board should have considered the application of the *Privacy Act* to the disclosure of home contact information, rather than simply adopting the agreement of the parties. It therefore remitted the matter to the Board for redetermination, and directed that the Office of the Privacy Commissioner and B be given notice of the redetermination proceedings and an opportunity to make submissions. At that redetermination hearing, B’s position was that disclosure of her home telephone number and address breached her privacy rights and her *Charter* right not to associate with the union.

The Board concluded that workplace contact information was insufficient to allow a bargaining agent to meet its obligations to represent all employees in the bargaining unit and that a bargaining agent had a right to contact all employees directly. It also found that there was no breach of the *Privacy Act* in disclosing home telephone numbers and addresses to bargaining agents because that disclosure was consistent with the purpose for which the information was obtained and was, as a result, a “consistent use” of the information under s. 8(2)(*a*) of the *Privacy Act*. But it put two additional safeguards in place: the information was to be provided to the union only on an encrypted or password‑protected basis, and expired home contact information was to be appropriately disposed of after updated information was provided. Because the Board concluded that the directions of the Federal Court of Appeal required it to undertake only the assessment of the privacy rights of the employees in the bargaining unit, it did not address B’s *Charter* arguments.

B again sought judicial review. The Federal Court of Appeal concluded that the Board’s decision that the union needed employees’ home contact information in order to fulfill its representational duties was reasonable, and that the union’s use of home contact information was a “consistent use” under s. 8(2)(*a*) of the *Privacy Act*.

*Held* (Rothstein and Moldaver JJ. dissenting in part): The appeal should be dismissed.

*Per* LeBel, Abella, Cromwell, Karakatsanis and Wagner JJ.: The standard of review applicable to the Board’s decision is reasonableness. In the labour relations context in which B’s privacy complaints arose, the Board’s decision was reasonable.

A union has the exclusive right to bargain on behalf of all employees in a given bargaining unit, including Rand employees. The union is the exclusive agent for those employees with respect to their rights under the collective agreement and the union must represent those employees fairly and in good faith. While an employee is undoubtedly free not to join the union and to decide to become a Rand employee, he or she may not opt out of the exclusive bargaining relationship, nor the representational duties that a union owes to employees.

The *Public Service Labour Relations Act* imposes a number of specific duties on a union with respect to employees in the bargaining unit. These include a duty to provide all employees in the bargaining unit with a reasonable opportunity to participate in strike votes and to be notified of the results of such votes. An employee cannot waive his or her right to be fairly — and exclusively — represented by the union. Given that the union owes legal obligations to all employees — whether or not they are Rand employees — and may have to communicate with them quickly, the union should not be deprived of information in the hands of the employer that could assist in fulfilling those obligations.

The union needs effective means of contacting employees in order to discharge its representational duties. Work contact information is insufficient to enable the union to carry out its duties to bargaining unit employees for a number of reasons: it is not appropriate for a bargaining agent to use employer facilities for its business; workplace communications from bargaining agents must be vetted by the employer before posting; there is no expectation of privacy in electronic communications at the workplace; and the union must be able to communicate with employees quickly and effectively. An employer can control the means of workplace communication, can implement policies that restrict all workplace communications, including with the union, and can monitor communications. In addition, the union may have representational duties to employees whom it cannot contact at work, such as employees who are on leave, or who are not at work because of a labour dispute.

The intersecting privacy concerns emerge from the *Privacy Act*. It imposes a ban on disclosure of government‑held personal information, which includes home addresses and telephone numbers, subject to a number of exceptions listed in s. 8(2), including the “consistent use” exception. A use need not be identical to the purpose for which information was obtained in order to fall under s. 8(2)(*a*) of the *Privacy Act*; it must only be consistent with that purpose. There need only be a sufficiently direct connection between the purpose and the proposed use, such that an employee would reasonably expect that the information could be used in the manner proposed. The union needed employee home contact information to represent the interests of employees, a use consistent with the purpose for which the government employer collected the information, namely, to contact employees about the terms and conditions of their employment. The information collected by the employer was for the appropriate administration of the employment relationship. This purpose is consistent with the union’s intended use of the contact information.

The Board was entitled to conclude that its mandate on the redetermination was limited to the question of how much home contact information the employer could disclose to the union without infringing an employee’s rights under the *Privacy Act*, and did not include B’s argument that requiring an employer to provide a bargaining agent with the home address and phone number of its employees breached her right to freedom of association under s. 2(*d*) of the *Charter*. The compelled disclosure of home contact information in order to allow a union to carry out its representational obligations to all bargaining unit members does not engage B’s freedom not to associate with the union. In any event, that argument had no merit and was clearly bound to fail, whenever and wherever asserted. B’s s. 8 *Charter* argument alleging that the disclosure constituted an unconstitutional search and seizure similarly had no merit.

*Per* Rothstein and Moldaver JJ. (dissenting in part): This appeal is about a tribunal wrongly declining to exercise its jurisdiction to consider *Charter* arguments. Where a tribunal does not respond to a constitutional challenge because of a mistaken understanding of its jurisdiction, it is wrongfully declining the jurisdiction that it not only has, but that it must exercise. That constitutes an error of law.

The Public Service Labour Relations Board made a reasonable decision in holding that s. 186(1)(*a*) of the *Public Service Labour Relations Act* requires the employer to disclose some employee contact information to the union and that this complies with s. 8(2)(*a*) of the *Privacy Act*. The Board, however, incorrectly declined to determine B’s s. 2(*d*) *Charter* arguments. The Board possessed both the authority and the duty to decide her *Charter* arguments. It would be inconsistent with this Court’s jurisprudence to hold that a reviewing court can exclude such a fundamental aspect of the Board’s jurisdiction. In holding that the Board was barred from determining B’s *Charter* arguments on reconsideration, both the Board and the Federal Court of Appeal erred in law. This jurisdictional error resulted in a denial of procedural fairness insofar as B was deprived of her right to make her *Charter* submissions and have them considered and ruled upon.

Pursuant to the two‑step test in *Quan v. Cusson*, this Court should address B’s s. 2(*d*) and s. 8 *Charter* arguments. The mere provision of B’s home address and telephone number to the bargaining agent cannot be characterized as forced association, nor does it amount to compelled ideological conformity. Accordingly, there is no violation of freedom from association under s. 2(*d*) of the *Charter*. The disclosure of B’s home contact information to the union does not trigger the protection of s. 8 of the *Charter* because B did not have a reasonable expectation of privacy in the personal information disclosed. In any event, the disclosure cannot constitute a “seizure” for the purposes of s. 8 of the *Charter* since the information was disclosed to an employee organization and not the state.

The appeal should be allowed, but only in respect of the Federal Court of Appeal’s order of costs payable by B to the respondents.

**Cases Cited**

By Abella and Cromwell JJ.

**Referred to:** *Millcroft Inn Ltd. and CAW‑Canada, Local 448* (2000), 63 C.L.R.B.R. (2d) 181; *Monarch Transport Inc. and Dempsey Freight Systems Ltd.*, 2003 CIRB 249 (CanLII); *P. Sun’s Enterprises (Vancouver) Ltd. and CAW‑Canada, Local 114* (2003), 99 C.L.R.B.R. (2d) 110; *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211; *R. v. Advance Cutting & Coring Ltd.*, 2001 SCC 70, [2001] 3 S.C.R. 209.

By Rothstein J. (dissenting in part)

*Public Service Alliance of Canada v. Treasury Board (Canada Border Services Agency)*, 2012 PSLRB 58 (CanLII); *Canadian National Railway Company* (1994), 95 di 78; *Consolidated Bathurst Packaging Ltd.*, [1983] OLRB Rep. 1411; *CFTO‑TV Limited* (1995), 97 di 35; *Ford Glass Limited*, [1986] OLRB Rep. 624; *Canada Post Corporation* (1994), 96 di 48; *York University*, [2007] OLRB Rep. 659; *R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765; *Quan v. Cusson*, 2009 SCC 62, [2009] 3 S.C.R. 712; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers’ Association*, 2011 SCC 61, [2011] 3 S.C.R. 654; *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211; *R. v. Advance Cutting & Coring Ltd.*, 2001 SCC 70, [2001] 3 S.C.R. 209; *R.W.D.S.U., Local 558 v. Pepsi‑Cola Canada Beverages (West) Ltd.*, 2002 SCC 8, [2002] 1 S.C.R. 156; *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34; *R. v. Plant*, [1993] 3 S.C.R. 281; *R. v. Dyment*, [1988] 2 S.C.R. 417.

**Statutes and Regulations Cited**

*Canadian Charter of Rights and Freedoms*, ss. 2(*d*), 8.

*Privacy Act*, R.S.C. 1985, c. P‑21, s. 8(2)(*a*).

*Public Service Labour Relations Act*, S.C. 2003, c. 22 [as en. by *Public Service Modernization Act*, S.C. 2003, c. 22, s. 2], ss. 36, 42, 183, 184, 185, 186(1)(*a*), 190(1)(*b*), (*g*).

APPEAL from a judgment of the Federal Court of Appeal (Blais C.J. and Evans and Sharlow JJ.A.), 2012 FCA 92, 431 N.R. 317, 347 D.L.R. (4th) 577, [2012] F.C.J. No. 467 (QL), 2012 CarswellNat 1077, affirming a decision of the Public Service Labour Relations Board, 2011 PSLRB 34, [2011] C.P.S.L.R.B. No. 36 (QL), 2011 CarswellNat 1296. Appeal dismissed, Rothstein and Moldaver JJ. dissenting in part.

*Elizabeth Bernard*, on her own behalf.

*Anne M. Turley*, for the respondent the Attorney General of Canada.

*Peter C. Engelmann*, *Colleen Bauman* and *Isabelle Roy*, for the respondent the Professional Institute of the Public Service of Canada.

*Michael A. Feder* and *Angela M. Juba*, for the *amicus curiae*.

*S. Zachary Green*, for the intervener the Attorney General of Ontario.

*Keith Evans*, for the intervener the Attorney General of British Columbia.

*Roderick S. Wiltshire*, for the intervener the Attorney General of Alberta.

*Andrew Raven*, for the intervener the Public Service Alliance of Canada.

*Eugene Meehan*, *Q.C.*, *Patricia Kosseim* and *Kate Wilson*, for the intervener the Privacy Commissioner of Canada.

Written submissions only by *Hugh J. D. McPhail*, *Q.C.*, for the intervener the Canadian Association of Counsel to Employers.

*Timothy Gleason* and *Sean Dewart*, for the intervener the Canadian Civil Liberties Association.

*Mark A. Gelowitz* and *Gerard J. Kennedy*, for the intervener the Canadian Constitution Foundation.

*John R. Carpenter* and *Kara O’Halloran*, for the intervener the Alberta Federation of Labour.

Written submissions only by *Andrea Zwack* and *Simon Ruel*, for the interveners the Coalition of British Columbia Businesses and Merit Canada.

*John B. Laskin*, for the intervener the Public Service Labour Relations Board.

The judgment of LeBel, Abella, Cromwell, Karakatsanis and Wagner JJ. was delivered by

1. Abella and Cromwell JJ. —The Public Service Labour Relations Board concluded that an employer was required to provide home contact information about bargaining unit members to the union which represents them because this information is needed by the union in order to carry out its representational duties. At the same time, however, the union must ensure that the information is kept secure and is used only for representational purposes. The main issue in this appeal is whether that decision was reasonable. We conclude that it was.

Background

1. Elizabeth Bernard is the protagonist in a legal odyssey which has found its way through three administrative tribunal proceedings, two rounds of judicial review in the Federal Court of Appeal and now an appeal to this Court. She is a member of a bargaining unit in the federal public service, but does not belong to the union which has exclusive bargaining rights for her bargaining unit. In labour relations terms, this means that Ms. Bernard is a “Rand Formula employee”; in other words, although she is not a union member, she is entitled to the benefits of the collective agreement and representation by the union and is required to pay union dues. The union is the *exclusive* bargaining agent for *all* members of the bargaining unit and has representational duties — such as in collective bargaining, the grievance process, workforce adjustments, prosecuting complaints, and conducting strike votes. Those duties are owed to *all* bargaining unit members, whether or not they are members of the union. While Ms. Bernard has a right not to become a union member, she does not have the right to opt out of the union’s role as exclusive bargaining agent for all bargaining unit employees, including her.
2. In early 1992, Ms. Bernard filed a complaint with the Office of the Privacy Commissioner because her employer was giving her home address to the union. In May 1993, the Office of the Privacy Commissioner concluded that such disclosure was not permitted under the *Privacy Act*, R.S.C. 1985, c. P-21,without the employee’s consent. As a result, the employer decided to discontinue the practice. The Office of the Privacy Commissioner had no adjudicative or order-making authority and the conclusions reached by that office did not confer any rights on Ms. Bernard or anyone else.
3. In 1995, Ms. Bernard changed jobs within the federal public service and became a member of a bargaining unit represented by the Professional Institute of the Public Service of Canada. Once again, she did not join the union and was a “Rand Formula employee” in her new bargaining unit.
4. In 2005, there were amendments to the *Public Service Labour Relations Act*, S.C. 2003, c. 22, s. 2, which significantly expanded the union’s representational obligations. Because of these new duties the union was of the view that it required home contact information for bargaining unit members. It sought that information from the employer in order to carry out these obligations. The employer refused. This led to consolidated complaints in September 2007 by the union alleging that the refusal to provide this information constituted an unfair labour practice. The union alleged that failure to provide it with bargaining unit member home contact information improperly interfered with its ability to represent bargaining unit members. The parties to the consolidated complaints were, as is always the case, the employers (the Treasury Board of Canada and the Canada Revenue Agency) and the union in its capacity as exclusive bargaining agent for the bargaining unit members. As is the usual practice, Ms. Bernard was not given individual notice of the proceedings at this point, in common with the tens of thousands of other bargaining unit members for whom the union had exclusive bargaining rights and whose personal information was at issue in the consolidated complaints.
5. As a remedy, the union sought an order requiring the employer to provide the names, position titles, telephone numbers, and home and email addresses for all employees in six nation-wide bargaining units, including the bargaining unit of which Ms. Bernard was a member.
6. In response, the employer did not dispute the jurisprudence relied on by the union endorsing the requirement to disclose personal information to unions for legitimate bargaining purposes. In other words, the employer did not dispute the premise of the union’s complaint that it had to provide some employee information and that failure to do so could constitute an unfair labour practice. However, the employer raised some practical concerns about employee privacy and about the accuracy and completeness of its own information. The employer placed before the Board an opinion obtained from the Office of the Privacy Commissioner addressing these points. The Board decided that “in principle”, the employer’s failure to provide the union “with at least some of the employee contact information that it requested” was an unfair labour practice because it interfered with the representation of employees by the union within the meaning of s. 186(1)(*a*) of the *Public Service Labour Relations Act*. It pointed particularly to the union’s responsibilities in connection with the conduct of a strike vote (s. 184) and a final-offer vote (s. 183) as “legitimate representational purposes” that justified the disclosure of the kind of personal information sought by the union. In so concluding, the Board relied on an extensive body of jurisprudence holding that employee contact information must be disclosed to the union by the employer for these purposes: *Millcroft Inn Ltd. and CAW-Canada, Local 448* (2000), 63 C.L.R.B.R. (2d) 181 (Ont.) (“*Millcroft*”); *Monarch Transport Inc. and Dempsey Freight Systems Ltd.*,2003 CIRB 249 (CanLII); *P. Sun’s Enterprises (Vancouver) Ltd. and CAW-Canada, Local 114* (2003), 99 C.L.R.B.R. (2d) 110 (B.C.).
7. On the question of remedy, the Board was clearly alive to the privacy issues canvassed in the Privacy Commissioner’s opinion and indicated that it did not have a sound basis upon which to address those issues. The Board asked for more information about several privacy-related issues, including: what information the union required for its representational obligations; what employee contact information the employer had in its possession and its accuracy; and whether the employer could meet its obligation to provide information in a way that reasonably addressed any concerns under the *Privacy Act*. The Board directed the parties to consult in order to determine whether they could agree on disclosure terms, failing which the Board would hold a further hearing to address the question of remedy.
8. The parties did in fact reach an agreement about the remedy and gave the Board a draft consent order, which the Board incorporated into an order on July 18, 2008.
9. Under the terms of the agreement, the employer was required to disclose to the union, on a quarterly basis, the home mailing addresses and home telephone numbers of members of the bargaining unit, subject to a number of conditions, all of which related to the security and privacy of the information. The union recognized “the sensitivity of the information being disclosed” and undertook in the agreement to “ensure vigilant management and monitoring controls on this information at all times”. In particular, it undertook not to disclose the information to anyone other than the appropriate union officials; not to use, copy or compile the information for any other purpose; and to ensure that its officials who had access to the information would comply with all the provisions of the agreement.
10. The employer and the union also agreed that they would jointly advise employees as to what information would be disclosed prior to its disclosure, and agreed on the text of that notice. An email was accordingly sent to all bargaining unit members on October 16, 2008, including Ms. Bernard, who responded by seeking judicial review of the consent order, claiming that (a) the Board’s order required the employer to violate the *Privacy Act* by disclosing her personal information without her consent; (b) the Board must defer to the Office of the Privacy Commissioner and in particular its 1993 disposition of her complaint; (c) she ought to have been given notice of the proceedings before the Board; and (d) the Board’s order breached her *Charter* right not to associate with the union.
11. The Federal Court of Appeal (Blais C.J., Pelletier and Trudel JJ.A.) confirmed that the Board’s initial decision was that “some” contact information must be provided, and noted that that decision was not under review. Nor was the Board’s decision that the failure to provide such information amounts to interference in the administration of the union. The issue before it, instead, was “the nature of the information to be provided and the circumstances under which it must be provided”.
12. The Federal Court of Appeal concluded that the Board should have considered the application of the *Privacy Act* to the disclosure of home contact information under the *Public Service Labour Relations Act*,rather than simply adopting the agreement arrived at by the parties. It therefore remitted the matter to the Board for redetermination, and directed that the Office of the Privacy Commissioner and Ms. Bernard be given notice of the redetermination proceedings and an opportunity to make submissions. It did not deal with Ms. Bernard’s freedom of association argument, nor with her argument that she ought to have been given notice of the prior proceedings before the Board.
13. At the redetermination hearing, the Privacy Commissioner acknowledged that the Board was entitled to order disclosure of personal information pursuant to the *Public Service Labour Relations Act*, referring to its 1993 decision as a “*non-binding report of findings*” to Ms. Bernard and her employer (emphasis added). However, the Commissioner urged the Board “to carefully consider what personal information is minimally required from the employer” to satisfy the union’s representational obligations, to explore “alternative ways” for the union to meet its statutory obligations, and to “ensure adequate safeguards for all employee personal information, and the implementation of privacy best practices”.
14. Ms. Bernard’s position was that disclosure of her home telephone number and address breached her privacy rights and her right not to associate with the union. The Board addressed all of the privacy concerns raised by Ms. Bernard and the Commissioner. It concluded that work contact information was insufficient to allow a bargaining agent to meet its obligations to represent all employees in the bargaining unit. In its view, “a bargaining agent has a right to contact all employees directly — relying on employees going to a website or talking to a steward does not meet that obligation”: 2011 PSLRB 34 (CanLII), at para. 164.
15. The Board ultimately turned to the question of whether the consent order properly protected the privacy interests of employees. It noted the following privacy-enhancing features of the original consent order: the union could use the home contact information only for legitimate purposes under the *Public Service Labour Relations Act* and not for any other purposes; and it could not disclose the information to anyone other than those officials responsible for fulfilling its obligations. The Board also noted that the union had specifically undertaken to be bound by the principles of the *Privacy Act* and regulations and the principles of the Government Security Policy in effect at the time. Nonetheless, it put two additional safeguards in place: the information should be provided to the union only on an encrypted or password-protected basis, and expired home contact information had to be appropriately disposed of after updated information was provided.
16. There was no breach of the *Privacy Act* in disclosing home telephone numbers and addresses to bargaining agents because that disclosure was consistent with the purpose for which the information was obtained and was, as a result, a “consistent use” of the information under s. 8(2)(*a*) of the *Privacy Act*.
17. Because the Board concluded that the directions of the Federal Court of Appeal required it to undertake only the assessment of the privacy rights of the employees in the bargaining unit, it did not address Ms. Bernard’s freedom of association argument.
18. Ms. Bernard again sought judicial review. The Federal Court of Appeal (Blais C.J., Evans and Sharlow JJ.A.) concluded that the Board’s decision was subject to a reasonableness standard of review. It also concluded that the Board’s decision was reasonable in finding that the union needed employees’ home contact information in order to fulfill its representational duties and that the union’s use of home contact information was a “consistent use” under s. 8(2)(*a*) of the *Privacy Act*.
19. We agree that the standard of review is reasonableness. For the following reasons, we also agree with the conclusion that the Board’s decision was reasonable.

Analysis

1. It is important to understand the labour relations context in which Ms. Bernard’s privacy complaints arise. A key aspect of that context is the principle of majoritarian exclusivity, a cornerstone of labour relations law in this country. A union has the *exclusive* right to bargain on behalf of *all* employees in a given bargaining unit, including Rand employees. The union is the exclusive agent for those employees with respect to their rights under the collective agreement. While an employee is undoubtedly free not to join the union and to decide to become a Rand employee, he or she may not opt out of the exclusive bargaining relationship, nor the representational duties that a union owes to employees.
2. The nature of the union’s representational duties is an important part of the context for the Board’s decision. The union must represent all bargaining unit employees fairly and in good faith. The *Public Service Labour Relations Act* imposes a number of specific duties on a union with respect to employees in the bargaining unit. These include a duty to provide all employees in the bargaining unit with a reasonable opportunity to participate in strike votes and to be notified of the results of such votes (s. 184). According to the Board, similar obligations apply to the conduct of final-offer votes under s. 183 of the *Act*.
3. This is the context in which to consider the reasonableness of the Board’s findings that disclosure of home contact information is required under the *Public Service Labour Relations Act* and authorized by s. 8(2)(*a*) of the *Privacy Act*. The relevant provisions of the *Public Service Labour Relations Act* state:

**185.** [Meaning of “unfair labour practice”] In this Division, “*unfair labour practice*” means anything that is prohibited by subsection 186(1) or (2), section 187 or 188 or subsection 189(1).

**186.** [Unfair labour practices — employer] (1) Neither the employer nor a person who occupies a managerial or confidential position, whether or not the person is acting on behalf of the employer, shall

(*a*) participate in or interfere with the formation or administration of an employee organization or the representation of employees by an employee organization . . .

1. The Board found that the employer’s refusal to disclose employee home contact information constituted an unfair labour practice because it interfered with the union’s representation of employees. Two rationales fueled this conclusion. The first is that the union needs *effective* means of contacting employees in order to discharge its representational duties. This was explained in *Millcroft*, where the Ontario Labour Relations Board extensively reviewed a union’s duties and concluded that the union “must be able to communicate effortlessly with the employees” and “should have [their contact information] without the need to pass through the obstacles suggested by the employer” in order to discharge those representational duties: para. 33.
2. The Boardexplained why employee work contact information was insufficient to enable the union to carry out its duties to bargaining unit employees: it is not appropriate for a bargaining agent to use employer facilities for its business; workplace communications from bargaining agents must be vetted by the employer before posting; there is no expectation of privacy in electronic communications at the workplace; and the union must be able to communicate with employees quickly and effectively, particularly when they are dispersed.
3. The second and more theoretical rationale for the employer’s obligation to disclose home contact information is that the union must be on an equal footing with the employer with respect to information relevant to the collective bargaining relationship. Disclosure of personal information to the union is not like disclosure of personal information to the public because of the tripartite relationship between the employee, the employer and the union. To the extent that the employer has information which is of value to the union in representing employees, the union is entitled to it. This was explained as follows in *Millcroft*:

A consequence of the union possessing exclusive bargaining status on behalf of the employees is that the union is placed in an equal bargaining position with the employer in its collective bargaining relationship. To the extent that the employer has information which is of value to the union in its capacity to represent the employees (such as their names, addresses and telephone numbers), the union too should have that information. The employees’ privacy rights are compromised (no doubt legitimately) by the employer having details of their names, addresses and telephone numbers. The union’s acquisition of that information would be no greater compromise, nor any less legitimate. [para. 31]

1. The Board’s conclusions are clearly justified. The union’s need to be able to communicate with employees in the bargaining unit cannot be satisfied by reliance on the employer’s facilities. As the Board observed, the employer can control the means of workplace communication, can implement policies that restrict all workplace communications, including with the union, and can monitor communications. Moreover, the union may have representational duties to employees whom it cannot contact at work, such as employees who are on leave, or who are not at work because of a labour dispute.
2. The second rationale — equality of information between the employer and the union — further supports the Board’s conclusion. The tripartite nature of the employment relationship means that information disclosed to the employer that is necessary for the union to carry out its representational duties should be disclosed to the union in order to ensure that the union and employer are on an equal footing with respect to information relevant to the collective bargaining relationship.
3. Moreover, an employee cannot waive his or her right to be fairly — and exclusively — represented by the union. Given that the union owes legal obligations to *all* employees — whether or not they are Rand employees — and may have to communicate with them quickly, the union should not be deprived of information in the hands of the employer that could assist in fulfilling these obligations.
4. This brings us to the intersecting privacy concerns. The *Privacy Act* imposes a ban on disclosure of government-held personal information, which includes home addresses and telephone numbers, subject to a number of exceptions listed in s. 8(2), including the consistent use exception:

**8.** . . .

(2) Subject to any other Act of Parliament, personal information under the control of a government institution may be disclosed

(*a*) for the purpose for which the information was obtained or compiled by the institution or *for a use consistent with that purpose*;

1. A use need not be identical to the purpose for which information was obtained in order to fall under s. 8(2)(*a*) of the *Privacy Act*; it must only be *consistent* with that purpose. As the Federal Court of Appeal held, there need only be a sufficiently direct connection between the purpose and the proposed use, such that an employee would reasonably expect that the information could be used in the manner proposed.
2. The Board concluded that the union needed employee home contact information to represent the interests of employees, a use consistent with the purpose for which the government employer collected the information, namely, to contact employees about the terms and conditions of their employment. The information collected by the employer was for the appropriate administration of the employment relationship. As the Board noted, “[e]mployees provide home contact information to their employers for the purpose of being contacted about their terms and conditions of employment. *This purpose is consistent with the [union]’s intended use of the contact information in this case*”: para. 168 (emphasis added).
3. In our view, the Board made a reasonable determination in identifying the union’s proposed use as being consistent with the purpose of contacting employees about terms and conditions of employment and in concluding that the union needed this home contact information to carry out its representational obligations “quickly and effectively”: para. 167.
4. Ms. Bernard also argued that requiring an employer to provide a bargaining agent with the home address and home phone number of its employees breaches her right to freedom of association under s. 2(*d*) of the *Charter* and that the Board should have considered this point.
5. The Federal Court of Appeal agreed with the Board that its mandate on the redetermination as set out in the Court of Appeal’s earlier decision was limited to the question of how much home contact information the employer could disclose to the union without infringing an employee’s rights under the *Privacy Act*. It was argued that the Court of Appeal erred in this regard. However, that view was clearly not shared by Blais C.J., who was the president of the panel in *both* proceedings before the Court of Appeal. Giving some weight to the Court of Appeal’s interpretation of its own order in these circumstances is not so much a matter of deference as of operating on the common-sense assumption that the Court knew what it meant. We would hesitate to say that the Board made a reviewable error by interpreting the Court of Appeal’s order in the same way that court itself did or by failing to deal with an issue that manifestly has no merit. But we see no need to reach any final view on this point.
6. This is one of the exceptional cases in which this Court is in a position to address those arguments now, and it can be done very summarily. They have no merit. Even if the Federal Court of Appeal erred with respect to the scope of the Board’s reconsideration, Ms. Bernard’s s. 2(*d*) and s. 8 *Charter* arguments that were supposedly neglected were clearly bound to fail, whenever and wherever asserted.
7. Ms. Bernard’s freedom of association argument has no legal foundation. Her argument was that since the Board’s order required the employer to provide her personal information to the union, she was thereby being compelled to associate with the union, contrary to s. 2(*d*) of the *Charter*. In our view, the compelled disclosure of home contact information in order to allow a union to carry out its representational obligations to all bargaining unit members does not engage Ms. Bernard’s freedom not to associate with the union. This Court’s decision in *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211, is determinative and its conclusion is supported by the more recent decision in *R. v. Advance Cutting & Coring Ltd.*, 2001 SCC 70, [2001] 3 S.C.R. 209.
8. In *Lavigne*, the Court concluded that the payment by Rand Formula employees of union dues for the purposes of collective bargaining did not amount to unjustified “compelled association” under s. 2(*d*). Even though s. 2(*d*) protected freedom *from* association as well as freedom *of* association, the majority concluded that s. 2(*d*) does not provide protection from all forms of involuntary association, and was not intended to protect against association with others that is a necessary and inevitable part of membership in a modern democratic community. In other words, s. 2(*d*) is not a constitutional right to isolation: *Lavigne*, at pp. 320-21. While in *Advance Cutting & Coring* three different approaches to the right not to associate emerged, on none of them would Ms. Bernard have a plausible s. 2(*d*) claim.
9. As La Forest J. explained in *Lavigne*: “. . . a [Rand Formula] worker like Lavigne would have no chance of succeeding if his objection to his association with the Union was the extent that it addresses itself to the matters, the terms and conditions of employment for members of his bargaining unit, with respect to which he is ‘naturally’ associated with his fellow employees. . . . With respect to these, the Union is simply viewed as a reasonable vehicle by which the necessary interconnectedness of Lavigne and his fellow workers is expressed” (p. 329).
10. In the case before us, providing Ms. Bernard’s home contact information to the union was reasonably found by the Board to be a necessary incident of the union’s representational obligations to her as a member of the bargaining unit. Based on the Court’s jurisprudence, therefore, Ms. Bernard’s freedom from association claim has no legal foundation.
11. Ms. Bernard’s s. 8 *Charter* argument alleging that the disclosure constituted an unconstitutional search and seizure similarly has no merit. As the Attorney General of Canada correctly points out, in this context there can be no reasonable expectation of privacy in that information.
12. We would dismiss the appeal without costs. There will be no costs on the application for leave to appeal.

The reasons of Rothstein and Moldaver JJ. were delivered by

Rothstein J. (dissenting in part) —

1. Introduction
2. Where a tribunal does not respond to a constitutional challenge, including a *Canadian Charter of Rights and Freedoms* challenge, because of a mistaken understanding of its jurisdiction, it is wrongfully declining the jurisdiction that it not only has, but that it must exercise. And it does not matter whether the tribunal refuses to even listen to the arguments, or says, having listened to them, that it is not responding to the arguments because it is not authorized to do so. In such circumstances the effect is a denial of procedural fairness to the affected litigant. However, where the reason for the failure is a misapprehension on the part of the tribunal on the scope of its authority, the error is more appropriately branded an error of law.
3. This is the case of a self-represented litigant and the repeated denial by the tribunal and the Federal Court of Appeal to hear and determine the *Charter* arguments made by her. It is significant in this case that the litigant is attempting to restore the longstanding privacy arrangements that she had previously succeeded in obtaining and that have now been taken away from her. It is important that such a litigant not be left to question a justice system that does not respond to *Charter* arguments made in the course of litigation. That is the main issue in this appeal.
4. This is not to say that tribunals do not have discretion to decline to engage in an analysis of *Charter* arguments that are, in their opinion, manifestly without merit. No tribunal is bound to consider such arguments. But that is not this case. This appeal is not about a tribunal exercising its *discretion* to decline to address non-meritorious *Charter* arguments. It is about a tribunal wrongly declining to exercise its *jurisdiction* to consider *Charter* arguments.
5. Facts and Decisions Below
   1. Background
6. The appellant, Elizabeth Bernard, is a self-represented litigant who has diligently sought to protect her privacy rights in the employment context for over 20 years.
7. Throughout her career as a federal public servant, Ms. Bernard has declined to join a union, as is her right. As an employee under the “Rand formula”, however, Ms. Bernard is still obligated to pay union dues.
8. Ms. Bernard began her career as a federal public servant with Revenue Canada — Taxation (now the Canada Revenue Agency (“CRA”)) in 1991. She was a member of what was then the Professional and Management group. In 1992, the bargaining agent for that group, the Public Service Alliance of Canada (“PSAC”), sent Ms. Bernard a letter to her home. Upon inquiry, the CRA’s human resources department told Ms. Bernard that the CRA had provided her home address and other personal information to PSAC. Ms. Bernard thereupon filed a complaint with the Office of the Privacy Commissioner (“OPC”) alleging that the employer had disclosed her home address and Social Insurance Number (“SIN”) to PSAC without her consent.
9. In May 1993, the OPC notified Ms. Bernard that her complaint had been upheld. And, in response to the OPC’s recommendations, Treasury Board of Canada officials ceased disclosing employees’ home addresses and SINs. Ms. Bernard thought this concluded the matter.
   1. Professional Institute of the Public Service of Canada v. Treasury Board and Canada Revenue Agency, 2008 PSLRB 13 (CanLII) (“PIPSC 1”)
10. In 1995, Ms. Bernard accepted a position at the CRA with a different job classification, which was subsequently reclassified as Audit, Financial and Scientific (“AFS”). The Professional Institute of the Public Service of Canada (“PIPSC”) is the bargaining agent for this group.
11. In 2007, PIPSC filed complaints against the Treasury Board and the CRA under s. 190(1)(*b*) and (*g*) of the *Public Service Labour Relations Act*, enacted by the *Public Service Modernization Act*, S.C. 2003, c. 22 s. 2 (“*PSLRA*”). PIPSC alleged, amongst other things, that the employers’ failure to provide requested employee contact information meant that it had failed to bargain in good faith and constituted an unfair labour practice under ss. 185 and 186(1) of the *PSLRA*. The union had requested employees’ names and position titles, as well as work and home telephone numbers, fax numbers, mailing addresses, and email addresses.
12. In its February 2008 interim decision, the Public Service Labour Relations Board (“Board”) held that the employers’ “failure to provide the complainant with at least some of the employee contact information that it requested” constituted interference in the representation of employees within the meaning of s. 186(1)(*a*) of the *PSLRA* (para. 67). The Board directed the parties to reach an agreement on how much contact information had to be disclosed to the union in order to meet the requirements of the *PSLRA*.
13. Ms. Bernard was neither a party to this proceeding, nor did she receive notice of it.
    1. Professional Institute of the Public Service of Canada v. Canada Revenue Agency, 2008 PSLRB 58 (CanLII) (“PIPSC 2”)
14. Following *PIPSC 1*, the CRA and the union came to an agreement and requested that its terms be incorporated into an order of the Board.
15. Accordingly, on July 18, 2008, the Board issued a consent order. Under its terms, the CRA undertook to disclose to PIPSC on a quarterly basis the home addresses and telephone numbers of the AFS bargaining unit’s members that the employer had in its human resources information system. PIPSC undertook to use that information only for the purposes of enabling it to fulfil its *PSLRA* representational obligations as exclusive bargaining agent, and to ensure that the personal information was securely stored and protected.
16. Ms. Bernard was not a party to this proceeding. However, the CRA notified employees by email of the Board’s decision on October 16, 2008. Ms. Bernard received this email on October 20, 2008, upon returning to work from leave. She promptly filed a motion for, and was granted an extension of time to file an application for judicial review of the Board’s *PIPSC 2* decision. She filed her application for judicial review on December 17, 2008.
    1. Bernard v. Canada (Attorney General), 2010 FCA 40, 398 N.R. 325 (“Bernard 1”)
17. On judicial review, Ms. Bernard argued that the Board’s order, mandating that the employer provide her home address and phone number to PIPSC, violated her privacy rights and infringed her s. 2(*d*) *Charter* right to freedom from association. She also argued that, as a party interested in the outcome of the Board’s proceedings, she ought to have been given notice of the proceedings and a chance to participate.
18. The Federal Court of Appeal granted Ms. Bernard’s application for judicial review on the privacy ground, holding that the Board erred by simply adopting the agreement between the employer and the union without considering the privacy rights of parties not involved in the proceedings. The court declined to address Ms. Bernard’s s. 2(*d*) *Charter* argument, stating that it was “premature to deal with the issues of the violation of Ms. Bernard’s right of freedom of association” (para. 45).
19. Consequently, the court remitted the matter to the Board for “re-determination and for a reasoned decision as to the information which the employer must provide the union in order to allow the latter to discharge its statutory obligations” (para. 42). The court further ordered the Board to give notice to Ms. Bernard of the proceedings and to give her the opportunity to participate.
    1. Professional Institute of the Public Service of Canada v. Canada Revenue Agency, 2011 PSLRB 34 (CanLII) (“PIPSC 3”)
20. The Board heard submissions from the parties and from interveners, including Ms. Bernard. Although Ms. Bernard once again raised her s. 2(*d*) *Charter* argument, the Board refused to address it, holding that the Federal Court of Appeal’s directions in *Bernard I* limited it to a reconsideration of the consent order in light of employees’ privacy rights.
21. The Board concluded that its *PIPSC 2* order complied with s. 8(2)(*a*) of the *Privacy Act*, R.S.C. 1985, c. P-21. The Board nevertheless amended the order, inserting the following further privacy safeguards: home contact information transmitted by the employer must be password protected or encrypted; the employer must advise employees on their initial appointment to a position in the bargaining unit that their home contact information will be shared with the union; and, when the union receives updated information from the employer, outdated home contact information must be appropriately disposed of.
    1. Bernard v. Canada (Attorney General), 2012 FCA 92, 431 N.R. 317 (“Bernard II”)
22. Ms. Bernard brought an application for judicial review to set aside the Board’s decision in *PIPSC 3*. She argued, amongst other things, that the Board erred in declining to consider her *Charter* arguments. The Federal Court of Appeal rejected this argument on the basis that its order in *Bernard I* limited the Board’s jurisdiction to determining how much contact information the CRA could disclose to PIPSC without infringing employees’ privacy rights.
23. The court went on to conclude that the Board’s decision was reasonable, and dismissed the application for judicial review.
24. Ms. Bernard subsequently appealed to this Court, and leave was granted on November 22, 2012.
25. Analysis
    1. Section 186(1)(a) of the PSLRA
26. I do not disagree with the conclusion of Justices Abella and Cromwell that the Board made a reasonable decision in holding that s. 186(1)(*a*) of the *PSLRA* requires the employer to disclose some employee contact information to the union and that this complies with s. 8(2)(*a*) of the *Privacy Act*.
27. I would add that the contention of the *amicus curiae* that s. 186(1)(*a*) of the *PSLRA* is a prohibition provision and not a duty-imposing provision cannot be sustained.
28. Labour boards have previously found positive obligations stemming from s. 186(1)(*a*) of the *PSLRA* and similar legislative provisions that prohibit employers from interfering with unions: see *Public Service Alliance of Canada v. Treasury Board (Canada Border Services Agency)*, 2012 PSLRB 58 (CanLII); *Canadian National Railway Company* (1994), 95 di 78; *Consolidated Bathurst Packaging Ltd.*,[1983] OLRB Rep. 1411; *CFTO-TV Limited* (1995), 97 di 35; *Ford Glass Limited*, [1986] OLRB Rep. 624; *Canada Post Corporation* (1994), 96 di 48; *York University*, [2007] OLRB Rep. 659.
29. It was not unreasonable for the Board in *PIPSC 1* to conclude that the employer was required by s. 186(1)(*a*) of the *PSLRA* to disclose some employee information to the union.
    1. The Board Erred in Refusing to Consider Ms. Bernard’s Section 2(d) Charter Arguments
30. My colleagues intimate, at para. 35, that the Board correctly declined to determine Ms. Bernard’s s. 2(*d*) *Charter* arguments. With respect, I cannot agree.
31. Ms. Bernard is a self-represented litigant. She believes that the Board’s order compelling the disclosure of her home address and telephone number to the bargaining agent forces her to associate with the union she has chosen not to join, and thus violates her s. 2(*d*) *Charter* right to freedom from association. Ms. Bernard tried to raise her s. 2(*d*) *Charter* claims before both the Board and the Federal Court of Appeal. Despite her assiduous efforts, both the Board and the court refused to consider these arguments.
32. In holding that the Board in *PIPSC 3* was barred from determining Ms. Bernard’s s. 2(*d*) *Charter* arguments, the Board and the Federal Court of Appeal erred in law. This jurisdictional error resulted in a denial of procedural fairness insofar as Ms. Bernard was deprived of her right to make her *Charter* submissions and have them considered and ruled upon.
    * 1. The Board Had a Duty to Decide Ms. Bernard’s Section 2(*d*) *Charter* Arguments
33. This Court has recently affirmed that “administrative tribunals with the authority to decide questions of law and whose *Charter* jurisdiction has not been clearly withdrawn have the corresponding authority — and duty — to consider and apply the Constitution, including the *Charter*, when answering those legal questions”: *R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765, at para. 77 (emphasis added). This aligns with the principle that Canadians should be permitted to present their *Charter* claims in the most accessible forum available, without having to bifurcate claims into separate proceedings (*Conway*,at para. 79).
34. In this case, the Board possessed the implied jurisdiction to decide questions of law, pursuant to s. 36 of the *PSLRA*:

**36.** The Board administers this Act and it may exercise the powers and perform the functions that are conferred or imposed on it by this Act, or as are incidental to the attainment of the objects of this Act, including the making of orders requiring compliance with this Act, regulations made under it or decisions made in respect of a matter coming before the Board.

There is no reason why the Board’s power to administer the *PSLRA* would not include the authority to decide questions of law linked to matters properly before it.

1. Section 42 of the *PSLRA* further supports the conclusion that the Board is able to decide questions of law:

**42.** In making an order or a decision, or doing any other thing in relation to any person under this Act, the Board may do so either generally or in any particular case or class of cases.

For a decision of the Board to apply generally or to a class of cases, it must, by necessary implication, involve the determination of legal questions.

1. Nowhere in the *PSLRA* is it “clearly demonstrated that the legislature intended to exclude the *Charter* from the [Board’s] jurisdiction” (*Conway*,at para. 81).
2. As explained below, the Board possessed both the authority and the duty to decide Ms. Bernard’s *Charter* arguments.
   * 1. *PIPSC 1* IsPart of the Same Proceeding as *PIPSC 2* and *PIPSC 3*
3. The government and the union submit that Ms. Bernard’s s. 2(*d*) *Charter* arguments should not be heard because they pertain to the Board’s holding in *PIPSC 1*, a decision she did not challenge by way of judicial review and which — they maintain — was beyond the Board’s reconsideration hearing jurisdiction.
4. Contrary to their submissions, the Board’s holding in *PIPSC 1* is not immune from analysis. Although Ms. Bernard did not directly challenge *PIPSC 1*, that decision is part of the same proceeding as *PIPSC 2* and *PIPSC 3*. The Board repeatedly characterized *PIPSC* *1* as an “interim decision” (*PIPSC 1*,at para. 1; *PIPSC 2*,at para. 2).The Board’s holding in *PIPSC 1* — that the employer must disclose “some”employee information to the bargaining agent — is by necessary implication imported into *PIPSC 2*,which clarified the precise content of this duty to disclose.
5. Ms. Bernard’s decision to challenge *PIPSC 2* by means of judicial review was not an attempt to circumvent proper procedural channels. On the contrary: given that she was not a party to *PIPSC 1* and that sheonly received notice, by email, of *PIPSC 2* — which included a hyperlink to the Board’s decision and informed her that the employer was now required to disclose employee home contact information to PIPSC — she pursued an eminently logical course of action.
6. The Federal Court of Appeal itself recognized the procedural conundrum in which Ms. Bernard found herself. In *Bernard I*, the court pointed out that, with respect to *PIPSC 1*, “[n]one of the Rand formula employees were given notice of the application, nor given a chance to intervene” (para. 9). It also acknowledged that Ms. Bernard did not challenge *PIPSC 1* by way of judicial review “because she was not aware of it at the material time” (para. 20).
7. Ms. Bernard raised her s. 2(*d*) *Charter* arguments three times during the course of these proceedings. She is still waiting for an answer. Contrary to the argument of the respondents, this Court should not withhold one simply for the reason — an erroneous one, in my view — that she should have challenged *PIPSC 1*, and not *PIPSC 2*.
8. In any event, at its core, Ms. Bernard’s s. 2(*d*) *Charter* challenge strikes not at the general *PIPSC 1* holding that the employer must provide “some” employee contact information to the bargaining agent, but rather at the *PIPSC 2* particularization that the employer must disclose employees’ home addresses and home telephone numbers to the bargaining agent. She conceded that “PIPSC is entitled to some contact information, namely, work addresses and work telephone numbers” (*PIPSC 3*,at para. 130). And, in her submissions during the reconsideration hearing, she requested that the Board change its order of July 18, 2008 — that is, *PIPSC 2 —* so that instead of home address and telephone number, “only work address and telephone numbers should be provided” (*PIPSC 3*, at para. 141).
9. The government’s contention in oral argument that Ms. Bernard should have initiated a separate action in which to invoke her *Charter* claim is inconsistent with this Court’s recognition that claimants are entitled to “assert their *Charter* rights in the most accessible forum available” (*Conway*,at para. 79).
   * 1. *Bernard I* Did Not Limit the Board’s Jurisdiction
10. In my respectful opinion, the Board in *PIPSC 3* and the Federal Court of Appeal in *Bernard II* erred in holding that the court in *Bernard I* limited the Board’s jurisdiction on reconsideration to the question of “how much home contact information the CRA may disclose to PIPSC without infringing Ms. Bernard’s rights under the *Privacy Act*” and precluded consideration of Ms. Bernard’s s. 2(*d*) *Charter* arguments (*Bernard II*,at para. 31; see also *PIPSC 3*,at paras. 9 and 158).
11. In *Bernard I*, the Federal Court of Appeal merely stated that “it would be premature to deal with the issues of the violation of Ms. Bernard’s right of freedom of association” (para. 45 (emphasis added)). Read in context, it is apparent that the court was saying that it would be premature for the *court* to consider this *Charter* question because it was remitting the matter to the Board for redetermination. That is, the court recognized that the *Charter* question could only properly be considered once the Board had conclusively determined whatinformation the employer had to disclose.
12. And, the only logical interpretation of the Federal Court of Appeal’s use of the term “premature” in *Bernard I* is that it expected the s. 2(*d*) *Charter* issue to be addressed at some stage of the proceedings. Given that this *Charter* question was necessarily bound up in the determination of what information had to be disclosed, the Board’s redetermination hearing was the proper forum for consideration of the *Charter* question.
13. The *Conway* test for determining whether an administrative tribunal has jurisdiction to hear *Charter* claims asks whether the legislature has *clearly* excluded consideration of these issues from the tribunal’s jurisdiction. It would be inconsistent with *Conway* to now hold that a reviewing court may exclude such a fundamental aspect of a tribunal’s jurisdiction.
14. With respect, I disagree with the Federal Court of Appeal’s intimation in *Bernard II* that, were the Board to have considered Ms. Bernard’s *Charter* argument in *PIPSC 3*, this would have amounted to an unauthorized reconsideration of *PIPSC 1* (para. 31). As explained above, *PIPSC 1* is part of the same proceeding and, in any case, Ms. Bernard’s s. 2(*d*) *Charter* argument equally targets the Board’s holding in *PIPSC 2*. Ms. Bernard is not asking the Board to reconsider its *PIPSC 1* decision; she is simply trying to vindicate her right to have her *Charter* claims decided.
15. The respondent PIPSC contends that, since the Federal Court of Appeal in *Bernard II* was interpreting its own earlier order in *Bernard I*, this Court should defer to the finding in *Bernard II* that the Board was precluded from considering the *Charter* issue.
16. However, the interpretation of the order in *Bernard I* is not subject to a deferential review by this Court. Indeed, the stock in trade of this Court is to review decisions of lower courts on questions of law of public importance on the standard of correctness, not on assumptions about what the lower court intended, as my colleagues assert at para. 35. There is therefore no reason to defer to the opinion of the court below in *Bernard II* regarding its interpretation of the decision in *Bernard I*. In any event, even on a deferential review, it is self-evident that a result that denies Ms. Bernard the opportunity to make her *Charter* arguments in these proceedings — as would be achieved under the *Bernard II* holding — is simply unreasonable.
    1. This Court Should Address the Section 2(d) and Section 8 Charter Arguments
17. The respondents suggest that, even if the Board’s failure to hear Ms. Bernard’s *Charter* arguments amounted to an error in law, this Court should not decide these arguments because they raise new issues; rather, the respondents maintain that they should be remitted to the Board for consideration. For the reasons that follow, I disagree.
18. I acknowledge that Ms. Bernard’s *Charter* arguments were not addressed by the Board and the Federal Court of Appeal and that the practice of this Court is generally not to determine issues not dealt with in the forums below. However, that is not a rule of mandatory application in all cases.
19. This Court outlined the two-step test for determining whether an appellate court may address an argument not decided by the lower courts in *Quan v. Cusson*, 2009 SCC 62, [2009] 3 S.C.R. 712, at para. 38. First, is the argument a “new issue” on appeal? If so, do the evidentiary record and the interests of justice support an exception to the general rule that a new issue cannot be raised on appeal?
    * 1. Ms. Bernard’s *Charter* Arguments Are Not New Issues
20. This Court must first determine whether Ms. Bernard’s s. 2(*d*) and s. 8 *Charter* arguments are “new issues” on appeal — that is, whether they are “legally and factually distinct” from the issues before the lower courts (*Quan*,at para. 39). Ms. Bernard made — or attempted to make — her s. 2(*d*) *Charter* arguments from the outset, as part of her application for judicial review in *Bernard I*, before the Board in *PIPSC 3*, and before the Federal Court of Appeal in *Bernard II*.
21. With respect to s. 8 of the *Charter*, the respondent PIPSC — in its response to Ms. Bernard’s application for leave to appeal — stated that Ms. Bernard had made a s. 8 *Charter* argument in the proceedings below (memorandum of argument, at para. 53). This would suggest that it is not a new issue. However, in its factum, PIPSC stressed that no such argument was previously made (para. 96).
22. Even were Ms. Bernard’s s. 2(*d*) and s. 8 *Charter* arguments to be characterized as “new issues”, the second step of the *Quan* test reinforces the view that this Court ought to decide these arguments.
    * 1. The Evidentiary Record and Interests of Justice Justifyan Exception to the Rule That a New Issue Cannot Be Raised on Appeal
23. The second step of the *Quan* test asks whether the evidentiary record and the interests of justice support an exception to the general rule that a new issue cannot be raised on appeal (para. 38; see also *Alberta (Information and Privacy Commissioner) v. Alberta Teachers’ Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, at para. 5). In my view, the circumstances of this case support application of the exception.
    * + 1. Evidentiary Record
24. The evidentiary record in this case is sufficient for this Court’s inquiry into the s. 2(*d*) *Charter* issue. The reasons of the Board and the Federal Court of Appeal reflect the fact that Ms. Bernard presented this claim three times: *Bernard I* (para. 24), *PIPSC 3* (para. 9), and *Bernard II* (para. 29). She now asks this Court to address it. The respondents are sophisticated parties who had ample opportunity to respond to the s. 2(*d*) constitutional question stated by this Court. And, at no point did the respondents argue that they would be prejudiced were this Court to decide the s. 2(*d*) *Charter* question.
25. Similarly, the respondents substantively addressed Ms. Bernard’s s. 8 *Charter* claims in their written submissions before this Court, and did not argue that prejudice would result should this Court proceed to consider the issue.
    * + 1. Interests of Justice
26. Ms. Bernard’s methodical attempts to have her *Charter* arguments addressed were consistently denied by the Board and the Federal Court of Appeal. The *Conway* principle is that tribunals have the authority and duty to “consider and apply the Constitution, including the *Charter*” (para. 77 (emphasis added)).Had leave to appeal to this Court not been granted, Ms. Bernard would have been entirely precluded from having her s. 2(*d*) and s. 8 *Charter* claims addressed in the course of these proceedings before the Board and the Federal Court of Appeal.
27. It is therefore in the interests of justice for this Court to address these arguments now.
    * 1. There Is No Violation of Section 2(*d*) Freedom From Association
28. Despite the view expressed by my colleagues at para. 35 that Ms. Bernard’s s. 2(*d*) *Charter* argument “manifestly has no merit”, they themselves give the argument more than the back of their hand. They provide reasons why, in this case, they would reject Ms. Bernard’s s. 2(*d*) argument. Had the Board done the same, we would not be here.
29. This Court outlined the criteria for freedom *from* association under s. 2(*d*) of the *Charter* in *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211, and *R*. *v. Advance Cutting & Coring Ltd.*, 2001 SCC 70, [2001] 3 S.C.R. 209. Two distinct tests emerge from these cases.
30. The first test (the “ideological conformity test”), which the majority of this Court applied in *Advance Cutting*,requires a claimant to demonstrate that there was forced association and compelled ideological conformity.
31. The second test (the “liberty test”) requires forced association and infringement of a liberty interest. Whether or not such a test can be applied in the context of a s. 2(*d*) *Charter* claim has not been definitely determined. Although a majority of the Court in *Advance Cutting* discussed the liberty test in *obiter* (see the reasons of Bastarache J., at para. 33 and LeBel J., at para. 221), only Justice Iacobucci applied that test, adopting it in lieu of the ideological conformity test (paras. 284-85). For the reasons outlined below, the existence of such a test need not be addressed here.
    * + 1. The Ideological Conformity Test
32. The first criterion of the ideological conformity test, the existence of forced association, is not satisfied.
33. I agree with Justices Abella and Cromwell that the mere provision of Ms. Bernard’s home address and telephone number to the bargaining agent cannot be characterized as forced association. In order to trigger the protections of s. 2(*d*) of the *Charter*, an individual must be compelled to perform one of the following acts of association: establish, belong to, maintain, or participate in an association (*Lavigne*,at p. 323, *per* La Forest J.). At most, the disclosure of information ordered by the Board would enable the bargaining agent to contact Ms. Bernard by phone, mail, or in person — she would in no way, however, be forced to escalate such benign forms of contact to the level of association. She could, for instance, hang up the phone, discard any mail received, or close the front door. The Board’s decisions have not withdrawn the freedom to refuse association from Ms. Bernard’s hands. As Justice La Forest stated in *Lavigne*, freedom from association is not “a right to isolation” (p. 320).
34. Ms. Bernard argues that the possibility of secondary picketing at her home, arising from the disclosure of her home address, infringes her s. 2(*d*) *Charter* right. It is true that this Court has held that secondary picketing is, *prima facie*, a legal activity: *R.W.D.S.U*.*, Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 SCC 8, [2002] 1 S.C.R. 156, at para. 67. Secondary picketing loses its legal sanction, however, where it amounts to tortious or criminal conduct (para. 3). It would thus be inconsistent with *Pepsi-Cola* for this Court to now pronounce that the mere *possibility* of secondary picketing — a *prima facie* legal activity — at Ms. Bernard’s home violates her s. 2(*d*) right to freedom from association.
35. In light of this conclusion, this Court need not address the second part of the test. Nevertheless, Ms. Bernard has also not demonstrated that the Board’s orders amounted to compelled ideological conformity. The question is whether the “activity associates the individual with ideas and values to which he or she does not voluntarily subscribe” (*Lavigne*, at p. 344, *per* McLachlin J., as she then was). Mere contact does not amount to such compulsion.
    * + 1. The Liberty Test
36. Assuming, without deciding, that our law recognizes that a s. 2(*d*) *Charter* claim to freedom from association may be advanced under the liberty test described above, the first criterion of the test — the existence of forced association — has not been established. This claim must therefore be rejected.
    * 1. There Is No Violation of Section 8 of the *Charter*
37. Ms. Bernard contends that the employer’s disclosure of her personal information without her consent constitutes an unlawful seizure under s. 8.
38. I agree with the submission of the Attorney General of Canada that, in light of the “totality of the circumstances”, Ms. Bernard did not have a reasonable expectation of privacy in the personal information disclosed by the employer to the bargaining agent (A.G. of Canada factum, at para. 69; see also *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34, at para. 40). The subject matter of the alleged seizure is limited to Ms. Bernard’s home address and telephone number. It can be surmised that Ms. Bernard has a direct interest and subjective expectation of privacy in this information. However, in the circumstances here, Ms. Bernard has not shown that the home addresses and telephone numbers of employees can reasonably be said to form part of the “biographical core of personal information” which tends “to reveal intimate details of the lifestyle and personal choices of the individual” (*R. v. Plant*, [1993] 3 S.C.R. 281, at p. 293; cited in *Cole*,at para. 45). Ms. Bernard’s subjective expectation of privacy in this information was therefore not objectively reasonable. The disclosure of her home address and telephone number to the bargaining agent therefore does not trigger the protection of s. 8 of the *Charter*.
39. In any event, since Ms. Bernard’s employer disclosed her home contact information — which she had voluntarily provided to the employer (A.F., at para. 86) — to the bargaining agent, which is an employee organization, it cannot constitute a “seizure” for the purposes of s. 8 of the *Charter*. As Justice La Forest noted in *R. v. Dyment*, [1988] 2 S.C.R. 417: “Section 8 was designed to protect against actions by the state and its agents” (p. 431). The union is neither the state, nor one of its agents.
40. Costs
41. Because the Board and the Federal Court of Appeal erred in law in refusing to hear and decide Ms. Bernard’s *Charter* arguments, I would allow her appeal but only in respect of the Federal Court of Appeal’s order of costs payable by her to the Attorney General of Canada and to PIPSC. In all other respects, I would dismiss the appeal. In light of the circumstances, the parties should bear their own costs in this Court.

Appeal dismissed without costs, Rothstein and Moldaver JJ. dissenting in part.

Elizabeth Bernard, on her own behalf.

Solicitor for the respondent the Attorney General of Canada:  Attorney General of Canada, Ottawa.

Solicitors for the respondent the Professional Institute of the Public Service of Canada:  Sack Goldblatt Mitchell, Ottawa.

*Solicitors appointed by the Court as amicus curiae:  McCarthy Tétrault, Vancouver.*

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitor for the intervener the Attorney General of British Columbia:  Attorney General of British Columbia, Vancouver.

Solicitor for the intervener the Attorney General of Alberta:  Attorney General of Alberta, Edmonton.

Solicitors for the intervener the Public Service Alliance of Canada:  Raven, Cameron, Ballantyne & Yazbeck, Ottawa.

Solicitors for the intervener the Privacy Commissioner of Canada:  Supreme Advocacy, Ottawa.

Solicitors for the intervener the Canadian Association of Counsel to Employers:  McLennan Ross, Edmonton.

Solicitors for the intervener the Canadian Civil Liberties Association:  Dewart Gleason, Toronto.

Solicitors for the intervener the Canadian Constitution Foundation:  Osler, Hoskin & Harcourt, Toronto.

Solicitors for the intervener the Alberta Federation of Labour:  Chivers Carpenter, Edmonton.

Solicitors for the interveners the Coalition of British Columbia Businesses and Merit Canada:  Heenan Blaikie, Ottawa.

Solicitors for the intervener the Public Service Labour Relations Board:  Torys, Toronto.